

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
3:07-cv-180

THOMAS RUTHERFOORD, INC., )  
                                  )  
                                  )  
Plaintiff,                   )                           ORDER  
                                  )  
                                  )  
v.                            )  
                                  )  
ARTHUR L. COLLEY, & NIELSON & )  
COMPANY, INC,                )  
                                  )  
Defendant.                   )                            )  
                                  )  
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**THIS MATTER** is before the Court on the defendant's Motion to Dismiss (Doc. No. 22) portions of Counts I and V of the Amended Complaint (Doc. No. 16), the plaintiff's Response (Doc. No. 24), the magistrate judge's Memorandum and Recommendation ("M&R") (Doc. No. 27), which recommended that the motion be denied. The parties were advised that objections were to be filed in writing within ten (10) days after service of the magistrate judge's decision. (Doc. No. 27: at 12). The time for filing objections has since passed and no objections have been filed by either party in this matter. The Court adopts the magistrate's factual findings as its own, and incorporates it herein. However, for the reasons stated below, the Court is left with a definite and firm conviction that the magistrate's M&R improperly applied the rule of law to the facts, and therefore GRANTS the defendant's Motion to Dismiss.

**I.       STANDARD OF REVIEW**

The Federal Magistrate Act provides that "a district court shall make a de novo determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Camby v. Davis, 718 F.2d 198, 200 (4th Cir.

1983). “By contrast, in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note). “A finding is clearly erroneous when, although there is evidence to support it, on the entire evidence the reviewing court is left with the definite and firm conviction that a mistake has been committed.” Faulconer v. C.I.R., 748 F.2d 890, 895 (4th Cir. 1984) (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

## II. CONCLUSION

Accordingly, after a careful review of the record in this case, the Court finds that the magistrate judge’s findings of fact are supported by the record and his conclusions of law are consistent with and supported by current case law. See Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982) (holding that only a careful review is required in considering a memorandum and recommendation absent specific objections). Thus, the Court hereby accepts the M&R of Magistrate Judge Horn and adopts it as the final decision of this Court.

**IT IS, THEREFORE, ORDERED** that the defendant’s Motion to Dismiss (Doc. No. 22) is **DENIED**.

Signed: February 25, 2008

  
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Robert J. Conrad, Jr.  
Chief United States District Judge  
